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REDEFINING LANDLORD TORT LIABILITY

Sargent v. Ross, — N.H. —, 308 A.2d 528 (1973)

Plaintiffs sued their landlord for damages as a result of the death of their four-year-old child. The child had fallen from a stairway that the landlord had added to the building eight years before the accident. The stairway's steep pitch and the lack of a railing sufficient to keep the child from falling over the side were shown to be the causes of the accident. The trial court gave judgment for the parents. On appeal, the landlord argued that there was no evidence of a concealed defect of which he should have been aware, that he had retained no control over the stairway, and therefore, that he owed no duty to either the parents or the child. The New Hampshire Supreme Court affirmed the trial court and *held*: Questions of control, hidden defects, and common or public use, which previously had to be established as prerequisites to consideration of a landlord's negligence, are relevant only to the basic tort issues of foreseeability and unreasonableness of a particular risk of harm.¹

At common law a lease was considered the sale of an interest in land,² and the tenant assumed all the responsibilities of ownership.³ Absent fraudulent misrepresentation⁴ or the failure to warn of known concealed defects,⁵ the landlord was shielded by the doctrine of caveat

1. *Sargent v. Ross*, — N.H. —, 308 A.2d 528 (1973). *Contra*, *American Fire & Cas. Co. v. Jackson*, 187 F.2d 379 (5th Cir.), *cert. denied*, 342 U.S. 818 (1951) (where plaintiff's child pulled away from plaintiff and fell through stair railing, landlord was not liable under Louisiana law because railing was safe for adults and landlord could reasonably expect that parent would look out for child).

2. 2 R. POWELL, *THE LAW OF REAL PROPERTY* § 221 (1973). *See generally* Harkrider, *Tort Liability of a Landlord*, 26 MICH. L. REV. 260 (1928).

3. *Fowler v. Bott*, 6 Mass. 63 (1809); *Lipsitz v. Schecter*, 377 Mich. 685, 142 N.W.2d 1 (1966); *Becar v. Flues*, 64 N.Y. 518 (1876). *See generally* 2 F. POLLOCK & F. MAITLAND, *HISTORY OF ENGLISH LAW* 131 (2d ed. 1923).

4. *See, e.g.*, *Logsdon v. Central Dev. Ass'n, Inc.*, 233 Mo. App. 499, 123 S.W.2d 631 (1938); *Daly v. Wise*, 132 N.Y. 306, 30 N.E. 837 (1892).

5. *Anderson v. Schuman*, 257 Cal. App. 2d 272, 64 Cal. Rptr. 662 (1967); *Wright v. Peterson*, 259 Iowa 1239, 146 N.W.2d 617 (1966); *Smith v. Green*, 358 Mass. 76, 260 N.E.2d 656 (1970); *Earle v. Kuklo*, 26 N.J. Super. 471, 98 A.2d 107 (App. Div. 1953). The duty to disclose known concealed defects also applied to the tenant's family and those who entered at the tenant's request. *See, e.g.*, *Wilensky v. Perell*, 72 So. 2d 278 (Fla. 1954); *Rahn v. Beurskens*, 66 Ill. App. 2d 423, 213 N.E.2d 301 (1966); *Texas*

emtor, and was not responsible for injuries suffered by the tenant due to a defect on the premises.⁶ Courts eventually recognized certain exceptions to this general rule of nonliability.⁷ For the tenant, the most

Co. v. Sowers, 258 S.W.2d 924 (Ky. 1953); Faber v. Creswick, 31 N.J. 234, 156 A.2d 252 (1959); Busch v. Gaglio, 207 Va. 343, 150 S.E.2d 110 (1966).

Although it was once necessary for the landlord to have actual knowledge of a latent defect, the courts have developed various standards to charge the landlord with constructive knowledge. See *Cohen Bros. v. Krumbein*, 28 Ga. App. 788, 113 S.E. 58 (1922) (discoverable in exercise of ordinary care); *Johnson v. O'Brien*, 258 Minn. 502, 105 N.W.2d 244 (1960) (prudent owner would have known); *Reckert v. Roco Petroleum Corp.*, 411 S.W.2d 199 (Mo. 1966) (should have known); *Cohen v. Cotheal*, 156 App. Div. 784, 142 N.Y.S. 99 (1913), *aff'd mem.*, 215 N.Y. 659, 109 N.E. 1070 (1915) (discoverable by reasonable inspection).

A Tennessee decision in 1898 held that the landlord had an affirmative duty to inspect prior to transferring the premises to the tenant. *Wilcox v. Hines*, 100 Tenn. 538, 46 S.W. 297 (1898). However, the case has not been followed in either Tennessee or other states. See *Woods v. Forest Hill Cemetery, Inc.*, 183 Tenn. 413, 423, 192 S.W.2d 987, 991 (1946) (landlord is under no obligation to make premises tenantable absent express agreement); *Pyburn v. Fourseam Coal Co.*, 303 Ky. 443, 197 S.W.2d 921 (1946); *State ex rel. Bohon v. Feldstein*, 207 Md. 20, 113 A.2d 100 (1955); *Harrill v. Sinclair Ref. Co.*, 225 N.C. 421, 35 S.E.2d 240 (1945).

6. See, e.g., *Little Rock Ice Co. v. Consumers Ice Co.*, 114 Ark. 532, 170 S.W. 241 (1914) (lessee's right to withhold rent); *Bowe v. Hunking*, 135 Mass. 380 (1883). Other cases are collected in Annot., 4 A.L.R. 1453 (1919). For a general discussion of caveat emptor, see *Grimes, Caveat Lessee*, 2 VALPARAISO U.L. REV. 189 (1968); *Waite, Caveat Emptor and the Judicial Process*, 25 COLUM. L. REV. 129 (1925).

7. This Comment focuses on the landlord's tort liability to the tenant, but two other categories of landlord tort liability should be noted. First, the landlord is obligated to inspect and repair the premises if the tenant intends to admit the public; thus, the landlord may be liable to patrons who enter the demised premises and are injured by a structural defect that he should have repaired. See *Spain v. Kelland*, 93 Ariz. 172, 379 P.2d 149 (1963) (landlord liable in tort to tavern patron); *Weibel v. Yale Univ.*, 125 Conn. 515, 7 A.2d 215 (1939) (beauty shop); *Lang v. Stadium Purchasing Corp.*, 216 App. Div. 558, 215 N.Y.S. 502 (1926) (theater); *Tulsa Entertainment Co. v. Greenless*, 85 Okla. 113, 205 P. 179 (1922) (grandstands); *Larson v. Colder's Park Co.*, 54 Utah 325, 180 P. 599 (1919) (amusement park); RESTATEMENT (SECOND) OF TORTS § 359 (1965). Some courts have refused to hold the landlord liable when an admittedly public use did not involve the entry of large numbers of people. See, e.g., *Marx v. Standard Oil Co.*, 6 N.J. Super. 39, 69 A.2d 748 (App. Div. 1949) (lessor not liable to gasoline station customer injured on demised premises); accord, RESTATEMENT OF TORTS § 359 (1934). *Contra*, *Hayes v. Richfield Oil Corp.*, 38 Cal. 2d 375, 240 P.2d 580 (1951) (lessor liable to injured gasoline station patron). The tenant is required to make reasonable efforts to maintain the premises as they were at the inception of the tenancy. See *Rogers v. Great Atl. & Pac. Tea Co.*, 148 Conn. 104, 167 A.2d 712 (1961) (dictum).

The second category of landlord tort liability involves the responsibility of the landlord to correct dangerous conditions which threaten the safety of those passing near the demised premises. See *Granucci v. Claasen*, 204 Cal. 509, 269 P. 437 (1928) (damaged driveway crossing sidewalk space); *Isham v. Broderick*, 89 Minn. 397, 95 N.W. 224

important of these exceptions was that which held the landlord liable in tort for failure to maintain common areas under the landlord's control.⁸

Recently courts have begun to expand the scope of a landlord's tort liability. The elimination of technical status categories of invitee, licensee, and trespasser has met with judicial approval.⁹ Although it was once the majority rule that the landlord's breach of a covenant to repair permitted only a contract action for the cost of repair,¹⁰ a growing number of states have allowed recovery in tort.¹¹ Also, dissatisfaction with the necessity of establishing the landlord's control over an area before holding him liable in tort has led courts to define control more loosely.¹²

(1903) (discharge of water across sidewalk); *City of San Angelo v. Sitas*, 143 Tex. 154, 183 S.W.2d 417 (1944) (sign protruding from demised premises). The lessor could even be responsible to outsiders for dangerous conditions created or maintained by the tenant with the lessor's permission. See *Laurensi v. Vranizan*, 25 Cal. 2d 806, 155 P.2d 633 (1945); *Fagan v. Silver*, 57 Mont. 827, 188 P. 900 (1920) (landlord who leased stone quarry is responsible for injuries occurring while quarry was operated by tenant).

8. See *Trimble v. Spears*, 182 Kan. 406, 320 P.2d 1029 (1958) (doorway on sidewalk); *Sonne v. Booker*, 310 S.W.2d 526 (Ky. 1958) (fire escape used as general stairway); *Temple v. Congress Square Garage*, 145 Me. 274, 75 A.2d 459 (1950) (hall); *Chalfen v. Kraft*, 324 Mass. 1, 84 N.E.2d 454 (1949) (area under stairway).

9. See *Rowland v. Christian*, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968) (distinction between licensee and invitee abolished with respect to duty owed by landowner); *Louisville Trust Co. v. Nutting*, 437 S.W.2d 484 (Ky. 1968) (in applying attractive nuisance doctrine, child's status as trespasser, licensee, or invitee is not controlling). These distinctions have also been eliminated in other areas of the law. See *Jones v. United States*, 362 U.S. 257 (1960) (standing to object to admission of allegedly unlawfully seized evidence is not dependent upon defendant's entrant classification); *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959) (common law distinction between licensee and invitee not imported into admiralty law).

10. See *Goff v. United States*, 159 F. Supp. 415 (D. Me. 1958); *Crawford v. Orner & Shayne, Inc.*, 331 Ill. App. 568, 73 N.E.2d 615 (1947) (dictum); *Leavitt v. Twin County Rental Co.*, 222 N.C. 81, 21 S.E.2d 890 (1942); *Dick v. Sunbright Steam Laundry Corp.*, 307 N.Y. 422, 121 N.E.2d 399 (1954); *Young v. Beattie*, 172 Okla. 250, 45 P.2d 470 (1935); *Caudill v. Gibson Fuel Co.*, 185 Va. 233, 38 S.E.2d 465 (1946).

11. See *Williams v. Davis*, 188 Kan. 385, 362 P.2d 641 (1961); *Sacks v. Pleasant*, 253 Md. 40, 251 A.2d 858 (1969); *Zuroski v. Estate of Strickland*, 176 Neb. 633, 126 N.W.2d 888 (1964); *Reitmeyer v. Sprecher*, 431 Pa. 284, 243 A.2d 395 (1968); *Rampone v. Wonskuck Bldgs., Inc.*, 102 R.I. 30, 227 A.2d 586 (1967). See also *RESTATEMENT (SECOND) OF TORTS* § 357 (1965).

It is uniformly held that the landlord is liable for negligently made repairs. See *Youngset, Inc. v. Five City Plaza, Inc.*, 156 Conn. 22, 237 A.2d 366 (1968); *Hunter v. Cook*, 149 Ind. App. 657, 274 N.E.2d 550 (1971); *Jellico Coal Co. v. Dulling*, 282 Ky. 698, 139 S.W.2d 749 (1949); *Finer v. Nichols*, 175 Mo. App. 525, 157 S.W. 1023 (1913); *Bross v. Varner*, 159 Pa. Super. 495, 48 A.2d 880 (1946).

12. See, e.g., *Berks v. Blackman*, 52 Cal. 2d 715, 344 P.2d 301 (1959) (where tenant had exclusive use of stairway it was question of fact whether stairway was common

In *Sargent v. Ross*, the court abrogated the rule of control in favor of a broad standard of due care,¹³ after reasoning as follows: Reliance upon the control rule prevents consideration of the essential issue of whether the landlord acted reasonably under the circumstances.¹⁴ Predicating liability on the necessity of showing control is a departure from the more general tort principle that one may be liable where his negligence has created a dangerous condition over which he no longer has exclusive control.¹⁵ Moreover, the control rule is anomalous because it may lead to a situation in which neither the tenant nor the landlord is responsible for correcting a dangerous situation.¹⁶ Indeed, the rule discourages the landlord from making repairs for fear of admitting control.¹⁷ Concern for human safety in an increasingly urban society supports abrogation of landlord tort immunity.¹⁸ Finally, adoption of a general standard of due care accords with those cases recognizing the implied warranty of habitability.¹⁹

Having previously recognized the implied warranty of habitability,²⁰ the New Hampshire court has now taken the additional step of making the landlord liable for injuries suffered on inadequately maintained

area over which landlord exercised control); *Fantacone v. McQueen*, 196 Cal. App. 2d 477, 16 Cal. Rptr. 630 (1961) (where tenant used ladder leading to roof there was question of fact whether it was common area over which landlord retained control); *Taylor v. New Jersey Highway Authority*, 22 N.J. 454, 126 A.2d 313 (1956) (tenant's guest permitted to recover for fall on common area against landlord who had acquired legal, but not actual, control). *Contra*, *Weaver v. United States*, 334 F.2d 319 (10th Cir. 1964).

13. — N.H. at —, 308 A.2d at 534-35. Various definitions of due care have been espoused. *See, e.g.*, *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 162 N.E. 99 (1928) (risk reasonably to be perceived defines duty to be obeyed); *Heaven v. Pender*, 11 Q.B.D. 503 (1883) (when everyone of ordinary sense perceiving the situation would recognize that if he did not exercise ordinary care in his conduct with regard to the situation he would create a danger of injury to others, a duty to use ordinary care and skill arises). *See generally* James, *Scope of Duty in Negligence Cases*, 47 NW. U.L. REV. 778 (1953); Seavey, *Negligence—Subjective or Objective*, 41 HARV. L. REV. 1 (1927); Terry, *Negligence*, 29 HARV. L. REV. 40 (1915).

14. — N.H. at —, 308 A.2d at 531.

15. *Id.* at —, 308 A.2d at 532.

16. *Id.*, 308 A.2d at 532.

17. *Id.*, 308 A.2d at 532.

18. *Id.* at —, 308 A.2d at 533.

19. *Id.*, 308 A.2d at 533.

20. *See* *Kline v. Burns*, 111 N.H. 87, 276 A.2d 248 (1971). Other jurisdictions have also recognized the implied warranty of habitability. *See, e.g.*, *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970); *Hinson v. Delis*, 26 Cal. App. 3d 62, 102 Cal. Rptr. 661 (1972); *Lemle v. Breeden*, 51 Hawaii 426, 462 P.2d 470 (1969); *Jack Spring, Inc. v. Little*, 50 Ill. 2d 351, 280 N.E.2d 208 (1972); *Mease v. Fox*, —

premises.²¹ However, no clear standard emerges for determining whether the landlord acted as a reasonable man. Moreover, it remains uncertain whether facts sufficient to show a breach of the implied warranty of habitability also justify recovery in tort. By abolishing the control rule, the court has created an obligation for the landlord to inspect and repair not only those areas under his immediate control, but also the inside of the tenant's apartment,²² except in the case of damage done by the tenant.

Implicitly, the court assumes that the landlord is better able to bear the financial loss of injuries attendant upon the operation of leased dwellings.²³ However, this assumption obscures the fundamental issue in the low-income housing market: Is either the landlord or the tenant able to meet the cost of improving the quality of the premises? In this connection, two subsidiary questions arise. The first is whether the landlord of low-income housing is making a sufficient profit to absorb the increased cost of warranting the fitness of the premises.²⁴ The second is whether the landlord can pass the additional operating costs on to the tenant in the form of higher rent.

Although the belief persists that the "slum landlord"²⁵ makes exorbitant profits at the expense of his tenant's health and safety,²⁶ mounting

Iowa —, 200 N.W.2d 791 (1972); Fritz v. Warthen, — Minn. —, 213 N.W.2d 339 (1973); King v. Moorehead, 495 S.W.2d 68 (Mo. Ct. App. 1973); Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970); Amanuensis Ltd. v. Brown, 65 Misc. 2d 15, 318 N.Y.S.2d 11 (N.Y. City Ct. 1971); Foisy v. Wyman, 83 Wash. 2d 22, 515 P.2d 160 (1973); Pines v. Persson, 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

21. Sargent v. Ross, — N.H. —, 308 A.2d 528 (1973). Courts in the District of Columbia have reached the same result. See Kline v. 1500 Mass. Ave. Apartment Corp., 439 F.2d 477 (D.C. Cir. 1970) (landlord liable to tenant for criminal act of third party where level of building security provided by landlord had been reduced since beginning of tenancy); Gould v. DeBeve, 330 F.2d 826 (D.C. Cir. 1964) (landlord liable for injuries suffered by trespassing child who fell through broken screening which local housing code required to be sufficient to keep out insects).

22. Cf. Garcia v. Freeland Realty, Inc., 63 Misc. 2d 937, 314 N.Y.S.2d 215 (N.Y. City Ct. 1970) (tenant permitted to recover cost of removing lead paint from *inside* of her apartment).

23. This is the risk distribution theory which seeks to impose tort liability in a manner most conducive to ameliorating the adverse economic impact of injuries throughout society. See Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944) (Traynor, J., concurring); RESTATEMENT (SECOND) OF TORTS § 402, comment c (1965).

24. The landlord's cost may be expected to rise either because judgments are awarded against the landlord for injuries suffered on the premises or because the landlord undertakes more inspection and repair.

25. See Sax & Hiestand, *Slumlordism as a Tort*, 65 MICH. L. REV. 869 (1967).

26. See generally W. KLEIN, *LET IN THE SUN* (1964).

evidence refutes this position. A study of inner city housing in Newark revealed a pattern of small-scale ownership which provided only modest returns.²⁷ Large profits, to the extent they are made, come about through such modest returns on a large number of holdings.²⁸ The growing rate of residential abandonment²⁹ seems to indicate that inner city landlords are caught in a profit squeeze: current rents are insufficient to permit extensive capital improvement that would attract tenants able to pay higher rents,³⁰ and higher rents may be beyond the resources of present tenants.³¹ Thus, the adoption of a standard of tort liability which promises to facilitate the tenant's recovery against the landlord may accelerate the growing abandonment by inner city landlords of their low-income property. The low-income tenant may find

27. G. STERNLIEB, *THE TENEMENT LANDLORD* 122 (1969).

28. M. STEGMAN, *HOUSING INVESTMENT IN THE INNER CITY: THE DYNAMICS OF DECLINE* 90 (1972).

29. Between 1960 and 1965, 15,000 units were annually removed from the New York City market for reasons other than demolition to make way for new construction. From 1965 to 1967 the figure climbed to 38,000 annually. I. LOWRY, *RENTAL HOUSING IN NEW YORK CITY: CONFRONTING THE CRISIS* 6 (Rand Doc. 1970). Moreover, abandonments are concentrated in low-income slum areas. See G. STERNLIEB & R. BURCHELL, *RESIDENTIAL ABANDONMENT* (1973); de Vise, *Chicago 1971 Ready for Another Fire*, in *GEOGRAPHICAL PERSPECTIVES ON AMERICAN POVERTY* 62 (R. Peet ed. 1972).

30. F. KRISTOFF, *URBAN HOUSING NEEDS THROUGH THE 1980's*, at 48-49 (1968); G. STERNLIEB, *THE URBAN HOUSING DILEMMA* 47 (1972).

The prevalence of small-scale ownership further obstructs efforts to improve the quality of inner city residential units. The value of renovation by one owner may be dissipated by the negative externalities of the surrounding area, i.e. it would be difficult to rent a refurbished townhouse in the middle of a slum unless the rent were so low as to compensate the tenant for the surrounding environment. Thus, the individual landlord may perceive the futility of undertaking any improvements. See Davis & Whinston, *The Economics of Urban Renewal*, 26 *LAW & CONTEMP. PROB.* 105 (1961). See also J. ROTHENBERG, *ECONOMIC EVALUATION OF URBAN RENEWAL* 47 (1967).

Further, the virtual collapse of the inner city mortgage market frequently prevents a landlord from obtaining the funds necessary to undertake significant repairs. See G. STERNLIEB, *THE URBAN HOUSING DILEMMA* ch. 11 (1972). See also L. GREBLER, *HOUSING MARKET BEHAVIOR IN A DECLINING AREA* 105 (1952); Muth, *Urban Residential and Housing Markets*, in *ISSUES IN URBAN ECONOMICS* 302-312 (1968).

31. According to the 1970 census, 81% of those families with incomes below \$5,000 who rent spend over 25% of their gross income on rent, and 62% of these families spend over 35% of their gross income on rent. A. DOWNS, *FEDERAL HOUSING SUBSIDIES: HOW ARE THEY WORKING?* 4 (1973). In a New York City study, it was revealed that, of 296,000 welfare households paying cash rent, over 83% reported rent/income ratios greater than 25%, and 56% reported rent/income ratios greater than 35%. I. LOWRY, *RENTAL HOUSING IN NEW YORK CITY: THE DEMAND FOR SHELTER* 62 (Rand Doc. 1971) (Table 14). It has been suggested that expenditures for rent consuming more than 25% of gross income are excessive. *Id.* at 127.

less substandard housing.³² The net result may be the replacement of relatively inexpensive, substandard housing by standard, but overcrowded, housing.

32. See note 29 *supra*.